Tekun Nasional v Plenitude Drive (M) Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCVC)(W)-2243–12 OF 2016, W-02(NCVC)(W)-2244–12 OF 2016 AND W-02(NCVC)(W)-2290–12 OF 2016

TENGKU MAIMUN, NALLINI PATHMANATHAN AND YAACOB MD SAM JJCA

24 APRIL 2018

Contract — Agreement — Breach — Parties entered into agreement to develop loan repayment facility by way of mobile gadget and standing instruction system — Supplier supplied and delivered gadgets for customer's use — Customer refused and failed to give instructions or consent to supplier to deliver remaining gadgets — Customer directed all its officers to stop using mobile gadgets — Customer failed to pay supplier's invoices and refused to continue with project without providing reasons — Whether there was breach of terms — Whether agreement repudiated

The defendant had appointed the plaintiff to develop the entire core system infrastructure of the defendant which consisted of upgrading a loan repayment facility by introducing the mobile gadget and standing instruction system. By cl 8.1, the duration of the agreement was fixed for a period of 15 years. It was the plaintiff's obligation to supply at least 500 mobile gadgets for the defendant's use throughout Malaysia. The plaintiff delivered 28 mobile gadgets to the defendant's headquarters but the defendant refused and failed to give any instructions or consent to the plaintiff to deliver the remaining 472 mobile gadgets. The defendant directed all its officers to stop using the mobile gadgets. The defendant also failed to pay the plaintiff's invoices and refused to continue with the mobile gadget project without providing any reasons. The plaintiff's access to the defendant's database and system was blocked. The plaintiff contended that the defendant breached the terms and repudiated the agreement. After giving the requisite contractual notices under the agreement for the defendant to rectify the breaches and the defendant having failed to do so, the plaintiff proceeded to terminate the agreement and claimed damages for the breaches and for wrongful repudiation of the agreement by the defendant. The plaintiff sent an invoice for the quoted amount of RM612,000 but the defendant failed to make payment. At the High Court, His Lordship found that the plaintiff successfully developed the system for the mobile gadget project; that the user acceptance test for the project was successfully conducted; that the defendant had approved and accepted the system for the mobile gadget project and that the plaintiff had conducted training sessions for the defendant's officers. The judgment entered for the plaintiff was in the amount

RM612,000. Hence, the present appeals. A

Held, dismissing appeals:

(1) The plaintiff had no licence to carry on the authorised business of payment system. However, the agreement was not ex facie illegal. Under the agreement, the plaintiff has undertaken to build and to develop the mobile gadget and standing instruction system for the defendant for purposes of collection of loan repayment from the defendant's customers. It was the defendant who collected the repayment either through the mobile gadget device used by the defendant's officers or through the standing instruction system. The plaintiff merely provided the infrastructure. Collecting repayment from its customers had been the business of the defendant for a long time albeit done manually without the mobile gadget and standing instruction developed by the plaintiff. The defendant had the requisite approval from Bank Negara to do so. As such it was at all material times carrying on approved or licensed business. Such approval was for the giving out of loans and collection of the same. The present contract merely served to facilitate the collection of the repayment of loans using information technology to replace manual collection. The business of collection of the repayment of its loans could not be an illegal business (see paras 63 & 70). B C D E

(2) The defendant's unilateral act of suspending the mobile gadget project amounted to a breach of the agreement. Clause 18.1 could only be invoked if there was unforeseen occurrence or development and that the defendant's change of mind and the purported non-compliance with the defendant's internal procedure does not entitle the defendant to resort to cl 18.1. The termination by the defendant pursuant to the direction given by the government was ineffective as prior thereto, the agreement had already been terminated by the plaintiff (see paras 73–74). F G

(3) Although the defendant may have initially expected the standing instruction system to be part of the zero investment concept, based on the conduct of the defendant, that expectation had been demolished. It was indeed strange that the defendant did not object to the plaintiff's detailed quotation on the standing instruction system. Not only did the defendant fail to object to the quotation for RM612,000, the invoice that followed was duly acknowledged by the defendant. The judge's decision on quantum of RM612,000 for the standing instruction system was upheld. The court did not agree with the said judge that the claim of RM29,829.132.40 was an item of special damages (see paras 86 & 88–89). H I

A **[Bahasa Malaysia summary**

Defendan telah melantik plaintif untuk memajukan keseluruhan pusat sistem infrastruktur defendan iaitu menaik taraf kemudahan bayaran balik pinjaman dengan memperkenalkan alat mudah alih dan sistem arahan tetap. Mengikut klausa 8.1, tempoh perjanjian ini ditetapkan selama 15 tahun. Plaintif berkewajipan membekalkan sekurang-kurangnya 500 alat mudah alih untuk kegunaan defendan di seluruh Malaysia. Plaintif menyerahkan 28 alat mudah alih ke ibu pejabat defendan tetapi defendan enggan dan tidak memberi apa-apa arahan atau persetujuan kepada plaintif untuk menyerahkan baki 472 alat mudah alih. Defendan mengarahkan semua pegawainya berhenti menggunakan alat mudah alih. Defendan juga gagal membayar invois plaintif dan enggan meneruskan projek alat mudah alih tanpa memberi sebarang alasan. Akses plaintif ke pangkalan data dan sistem defendan disekat. Plaintif berpendapat bahawa defendan melanggar terma dan menolak perjanjian tersebut. Selepas memberi notis kontrak yang diperlukan bawah perjanjian untuk defendan untuk membetulkan pelanggaran dan defendan gagal melakukannya, pihak plaintif terus menamatkan perjanjian itu dan menuntut ganti rugi untuk pelanggaran dan penolakan perjanjian yang salah oleh defendan. Plaintif menghantar invois untuk jumlah yang disebutkan sebanyak RM612,000 tetapi defendan gagal melakukan bayaran. Di Mahkamah Tinggi, hakim bicara mendapati bahawa plaintif berjaya memajukan sistem untuk projek alat mudah alih; bahawa ujian penerimaan pengguna untuk projek telah berjaya dijalankan; bahawa defendan telah meluluskan dan menerima sistem untuk projek alat mudah alih dan bahawa plaintif telah mengadakan sesi latihan untuk pegawai defendan. Penghakiman yang dimasukkan untuk plaintif adalah dalam jumlah RM612,000. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan-rayuan:

(1) Plaintif tidak mempunyai lesen menjalankan sistem bayaran perniagaan yang dibenarkan. Walau bagaimanapun, perjanjian ini bukanlah ex facie tidak sah. Di bawah perjanjian, plaintif telah berusaha membina dan membangunkan alat mudah alih dan sistem arahan tetap untuk defendan bagi tujuan kutipan bayaran balik pinjaman dari pelanggan defendan. Defendan yang mengutip bayaran balik sama ada melalui alat alat mudah alih yang digunakan oleh pegawai defendan atau melalui sistem arahan tetap. Plaintif hanya menyediakan infrastruktur. Mengambil bayaran balik daripada pelanggannya adalah perniagaan defendan untuk jangka masa yang lama walaupun dilakukan secara manual tanpa alat mudah alih dan arahan tetap yang dibangunkan oleh plaintif. Defendan mempunyai kelulusan yang diperlukan oleh Bank Negara untuk berbuat demikian. Oleh itu, pada setiap masa material, menjalankan perniagaan yang diluluskan atau berlesen. Kelulusan tersebut adalah untuk pemberian pinjaman dan kutipan yang sama. Kontrak ini semata-mata untuk memudahkan kutipan bayaran balik pinjaman menggunakan

teknologi maklumat untuk menggantikan kutipan manual. Perniagaan kutipan bayaran pinjamannya tidak boleh menjadikan perniagaannya tidak sah (lihat perenggan 63 & 70).

(2) Tindakan unilateral menggantung projek alat mudah alih itu adalah pelanggaran perjanjian. Fasal 18.1 hanya boleh digunakan jika terdapat kejadian atau perkembangan yang tidak dijangka dan perubahan fikiran defendan dan dawaan ketakpatuhan prosedur dalaman defendan tidak memberi hak kepada defendan mengguna pakai klausa 18.1. Penamatan oleh defendan menurut arahan yang diberi oleh kerajaan tidak berkesan seperti yang telah diberikan sebelum ini, perjanjian itu ditamatkan oleh plaintif (lihat perenggan 73–74).

(3) Walaupun defendan mungkin pada awalnya menjangkakan sistem arahan tetap menjadi sebahagian daripada konsep pelaburan sifar, berdasarkan kepada tindakan defendan, jangkaan ini tersasar. Sudah tentu pelik bahawa defendan tidak membantah kutipan terperinci plaintif bagi sistem arahan tetap. Bukan sahaja defendan gagal membantah sebut harga sebanyak RM612,000, invois seterunya telah diakui oleh defendan. Keputusan hakim mengenai kuantum RM612,000 untuk sistem arahan tetap dikekalkan. Mahkamah tidak bersetuju dengan hakim bicara bahawa tuntutan sebanyak RM29,829.132.40 adalah satu perkara ganti rugi khas (lihat perenggan 86 & 88–89).]

Notes

For cases on breach of agreement, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3477–3499.

Cases referred to

Beihai Zingong Property Development Co & Anor v Ng Choon Meng [1999] 1 SLR (R) 527, CA (refd)

Bonham-Carter v Hyde Park Hotel Ltd [1948] WN 89, KBD (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

CIMB Bank Bhd v Tan Kim Leong Holdings Sdn Bhd & Ors [2010] 8 MLJ 607, HC (refd)

Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313, FC (folld)

Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor [1994] 1 MLJ 369, SC (refd)

Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor [2015] 2 MLJ 24, CA (refd)

Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd [1914–15] All ER Rep 739, HL (refd)

Hely-Hutchinson v Brayhead Ltd and Anor [1968] 1 QB 549, CA (refd)

James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796, HL (refd)
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445; [2009] 4 CLJ 569, FC (folld)
Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (refd)
KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)
Kang Hai Holdings Sdn Bhd & Anor v Lee Lai Ban (trading as the sole proprietor under the name and style of 'Sang Excavating Services') [2018] 2 MLJ 574; [2018] 1 AMR 252, FC (refd)
Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81, FC (folld)
Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd [2004] MLJU 758; [2004] 4 CLJ 18, CA (refd)
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)
Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd [2000] 2 MLJ 456, CA (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Royal British Bank v Turquand [1843-60] All ER Rep 435 (folld)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (folld)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 374, FC (folld)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324; [2001] 1 CLJ 779, CA (refd)
The Royal British Bank v Turquand (1855) 119 ER 474, KBD (folld)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Victory Avenue Mfg (M) Sdn Bhd v Matsushita Electronic Devices (M) Sdn Bhd [2009] 5 MLJ 243, HC (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)
Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd [1978] 139 CLR 410, HC (refd)

Legislation referred to

Banking Act 1959 (AUS) s 8
Contracts Act 1950 ss 74, 75
Evidence Act 1950 s 114(g)
Financial Services Act 2013 ss 2(1), 8, 8(1)(b), 270, Schedule 1, Part 1, Division 1

Companies Regulations 1966 Form 49
Rules of Court 2012 O 18 r 13(4)

Appeal from: Civil Suit Nos 22NCVC-382–07 of 2015 and 22NCVC-618–11 of 2015 (High Court, Kuala Lumpur)

Mubashir bin Mansor (YM Raja Nadhil Aqran b Raja Ahmad Aminollah, U Shasiraj and Lim Hui Li with him) (Raj, Ong & Yudistra) for the appellant.
Wong Yee Chue (Tan Swee Poh with him) (YC Wong) for the respondent.

Tengku Maimun JCA:

INTRODUCTION

[1] There are three appeals before us. The first appeal is filed by the appellant/defendant in respect of the judgment entered by the High Court for the plaintiff in the amount of RM612,000; the second appeal by the appellant/defendant relates to the finding of the High Court on liability with Civil Appeal Nos W-02(NCVC)(W)-2243–12 of 2016; W-02(NCVC)(W)-2244–12 of 2016 and W-02(NCVC)(W)-2290–12 of 2016 damages to be assessed and the third appeal is filed by the appellant/plaintiff against part of the order of the High Court in dismissing part of the plaintiff's claim.

[2] For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

BACKGROUND

[3] The defendant, Tabung Ekonomi Kumpulan Usaha Niaga (Tekun) Nasional, is an agency under the Ministry of Agriculture and Agro-Based Industry ('the Ministry'). It approves and disburses loan and collects repayment of these loans. At the material time, the defendant had approximately 300,000 borrowers.

[4] The collection of monies from borrowers had been done manually. The defendant's officers physically collect loan repayments from borrowers and physically issue receipts. This process was prone to abuse. The monies collected by the defendant's officers may not be recorded in time or at all and the defendant's record of repayment through the computer system may not be updated.

[5] To overcome the abuse, the plaintiff proposed to the defendant that collection of repayment be done via a device called the mobile gadget and a system of auto debit of borrowers' bank account, called the standing

instruction system. The plaintiff's proposals were made through two letters dated 3 July 2014 and 12 August 2014 respectively.

[6] The mobile gadget is a hand held device which is linked to the defendant's computer system. The defendant's officers responsible for the collection would take the mobile gadget along during collection of monies. The borrower has the option of paying by cash, cheque, credit card or debit card. Any payment information which is keyed in or obtained by swiping the payment card through the mobile gadget will be updated real time in the defendant's computer system. The mobile gadget will electronically issue a receipt and a short message service will be sent to the borrower to confirm the transaction. This would reduce the chances of misappropriation of the monies collected and the risk of undetected misappropriation.

[7] As for the standing instruction system, the defendant's borrowers would sign up with the bank and their accounts would be automatically debited and credited into the defendant's account.

PROCEEDINGS IN THE HIGH COURT

[8] The plaintiff filed two suits against the defendant (Suit Nos 382 and 618), claiming different reliefs arising out of the mobile gadget and the standing instruction, respectively. For Suit No 382, the plaintiff's claim is for RM29,829,132.40 and other reliefs including a claim for indemnity for damages payable to sub contractor, general damages for breach of contract and aggravated damages. In Suit No 618, the plaintiff is claiming for RM612,000 for successfully installing and commissioning the standing instruction system. Both suits were consolidated.

The plaintiff's case

[9] It is the plaintiff's case that by a letter of appointment dated 29 August 2014, the defendant appointed the plaintiff to develop the entire core system infrastructure of the defendant which consisted of upgrading the loan repayment facility by introducing the mobile gadget and standing instruction system. Thereafter, by an agreement dated 18 September 2014 ('the agreement'), the defendant awarded the plaintiff the contract to develop and implement the mobile gadget system. By cl 8.1, the duration of the agreement was fixed for a period of 15 years.

[10] The plaintiff's obligation under the agreement was to draft, design, develop and supply all hardware, software and technology so as to enable the defendant's officers to use the mobile gadget to collect repayment of loans from the defendant's borrowers. It was also the plaintiff's obligation to supply at least

500 mobile gadgets for the defendant's use throughout Malaysia. Under the agreement, the plaintiff was also required to supply all relevant technical services.

[11] The mobile gadget project was based on a zero investment concept where all costs and expenses were to be borne by the plaintiff. In consideration thereof and pursuant to cll 5.1 and 5.2 of the agreement, the plaintiff was entitled to RM1.50 for every loan repayment transaction ('the plaintiff's fees'). From the said RM1.50, the defendant was entitled to RM0.20.

[12] Under cl 6.3 of the agreement, the total of the plaintiff's fees for each month shall not be less than 130,000 transactions ('minimum monthly transaction'). If there were less than 130,000 transactions, the defendant would have to pay the difference between the actual total fees of the plaintiff and the minimum monthly transaction for each month. This differential payment was to be paid by the defendant within seven business days of the following month.

[13] The plaintiff entered into a sub contract agreement with Six Sigma Solutions Sdn Bhd ('Six Sigma') on 30 September 2014. This sub contract is a back to back arrangement where the entire job to be undertaken by the plaintiff under the agreement with the defendant will be performed by Six Sigma. Under the sub contract agreement between the plaintiff and Six Sigma, Six Sigma would earn RM1 per transaction, which means the plaintiff would only realise a profit of RM0.30 per transaction.

[14] On 26 November 2014, the plaintiff delivered 28 mobile gadgets to the defendant's headquarters in the Federal Territory. Since then, the mobile gadget system was successfully in use. The remaining 472 mobile gadgets were ready to be delivered to all of the defendant's branches throughout the country.

[15] The defendant however refused and failed to give any instructions or consent to the plaintiff to deliver the remaining 472 mobile gadgets. On 20 March 2015, the defendant directed all its officers in the Federal Territory to stop using the mobile gadgets. The defendant also failed to pay the plaintiff's invoices and refused to continue with the mobile gadget project without providing any reasons. The plaintiff's access to the defendant's database and system was blocked. The plaintiff's application was blocked on 23 March 2015.

[16] The plaintiff contended that the defendant breached the terms and repudiated the agreement. After giving the requisite contractual notices under the agreement for the defendant to rectify the breaches and the defendant having failed to do so, the plaintiff proceeded to terminate the agreement and

A claimed damages for the breaches and for wrongful repudiation of the agreement by the defendant.

[17] In respect of the standing instruction system, the plaintiff gave the defendant a quotation dated 26 September 2014 to develop and to complete the project at a cost of RM612,000. The plaintiff contended that the quotation was accepted and agreed to by the defendant, whereupon the plaintiff developed and completed the project. The system was tested with Malayan Banking Bhd ('Maybank') and after being accepted and approved by the defendant, the project went 'live' on or about 24 December 2014. The plaintiff sent an invoice dated 19 January 2015 for the quoted amount of RM612,000. The defendant failed to make payment.

The defendant's case

[18] The defendant, vide an email dated 29 December 2014, informed the plaintiff that they were unable to take delivery of the mobile gadgets until a study/review is completed.

[19] By a letter dated 20 March 2015, the defendant intimated to the plaintiff that they were suspending the use of the mobile gadget as per the instructions of the defendant's board of trustees and that the use of mobile gadgets would be put on hold pending further review.

[20] Pursuant to the directions of the defendant's board of trustees, the plaintiff was invited to attend a meeting on 17 April 2015. In this meeting, the defendant informed the plaintiff that they would re-negotiate the terms of the agreement with the plaintiff. The defendant reiterated this position in their letter to the plaintiff dated 20 April 2015.

[21] On 29 April 2015, the defendant issued a letter requesting the Ministry to intervene in the matter. The Ministry's representative set a date for a meeting on 22 May 2015. At the request of the plaintiff, this date was postponed to 26 May 2015. On 26 May 2015, the plaintiff's representative or its solicitors failed to attend. The defendant alleged that thereafter, in breach of cl 18.1 of the agreement regarding mutual trust and good faith, the plaintiff made no further attempt to set another date for discussion/negotiations.

[22] By a letter dated 26 May 2015 from the Ministry, the defendant was directed to terminate the agreement inter alia, due to breach of procedures in the procurement process. The case was also being investigated by the Malaysian Anti-Corruption Commission. The defendant alleged that Datuk Abdul Rahim bin Hassan, the then MD/CEO of the defendant had no authority to enter into the agreement and that his authority was limited to RM500,000.

Any transaction in excess of RM500,000 must obtain the approval of the board of trustees.

[23] Insofar as the standing instruction system is concerned, the defendant admitted that the system was developed and completed by the plaintiff, accepted by the defendant and that the system went live on or about 24 December 2014. The defendant also admitted that the plaintiff sent an invoice for RM612,000 for the standing instruction system duly developed and completed by the plaintiff. However, the defendant contended that it was not liable to pay as there was no agreement for the said amount and as the standing instruction system was part of the zero investment scheme.

FINDINGS OF THE HIGH COURT

[24] His Lordship found that the plaintiff had successfully developed the system for the mobile gadget project; that the user acceptance test for the project was successfully conducted; that the defendant had approved and accepted the system for the mobile gadget project and that the plaintiff had conducted training sessions for the defendant's officers.

[25] His Lordship considered the authority of the MD/CEO who executed the agreement for the defendant and the argument that the agreement was invalid because there was no approval by the defendant's board of trustees. The learned judge found no credible evidence that there was in existence such an internal process or procedure which requires contracts with a monetary value in excess of RM500,000 to be approved by the defendant's board of trustees.

[26] Relying on *Hely-Hutchinson v Brayhead Ltd and Anor* [1968] 1 QB 549 and *The Royal British Bank v Turquand* (1855) 119 ER 474, the learned judge held that even if there was a requirement for approval by the board of trustees (which has not been credibly proven), the absence of such an approval does not affect the validity or enforceability of the agreement. The learned judge further found that pursuant to cl 3.4(a) of the agreement, it was the defendant's responsibility to ensure that all the internal approvals, whatever they may be, are properly in place so as to ensure that the agreement is effective.

[27] Taking into account the events that transpired after the execution of the agreement, the learned judge held that there was strong credible evidence of acquiescence by the defendant that there was a valid contract for the mobile gadget project.

[28] On the issue of breach of agreement, the learned judge held that the defendant's conduct in unilaterally suspending the mobile gadget project was a conduct which evinced an intention to be no longer bound by the terms of the

agreement and was therefore repudiatory of the agreement. The plaintiff was therefore entitled to put an end to the agreement by issuing notice of termination under cll 10.1 and 10.2 of the agreement.

[29] The learned judge also considered cl 11.4 which provides for termination of the agreement pursuant to a change of the Government of Malaysia or pursuant to any instructions to that effect by the Government of Malaysia and for the parties to mutually discuss the winding down of the Civil Appeal Nos W-02(NCVC)(W)-2243–12 of 2016; W-02(NCVC)(W)-2244–12 of 2016 and W-02(NCVC)(W)-2290–12 of 2016 project. His Lordship also considered cl 18.1 of the agreement which provides:

> 18. MUTUAL TRUSTS
>
> 18.1 The Parties hereby acknowledged for a fact that is impracticable to make provision for every contingency that may arise, the Parties hereto declare it to be their intention that this Agreement shall operate between them with fairness and without detriment to any of them. If by reason of any unforeseen occurrence or development the operation of this Agreement it is likely to cause any inequitable hardship to one or more parties contrary to the spirit of the Agreement, the Parties shall negotiable *(sic)* immediately in good faith and use their best endeavours to agree upon such action as may be necessary or equitable.

[30] His Lordship formed the view that cl 18 of the agreement is not meant as an easy escape route for the defendant to compel the plaintiff to the discussion table in order to re-negotiate the terms of the agreement. In order for cl 18 to be invoked, it must be shown by credible evidence that an unforeseen event/occurrence or development has arisen and that the operation of the agreement is likely to cause inequitable hardship on one of the parties. In the present case, the learned judge found no evidence that such unforeseen events or developments have taken place.

[31] The conduct of the defendant, according to the learned judge, merely demonstrates that they had a change of mind in respect of the commercial terms and the duration of the agreement. The fact that there may be some non-compliance with the defendant's internal process or procedures (which at any rate the learned judge found not proven) is not a reason which falls within the purview of cl 18 of the agreement.

[32] In respect of the plaintiff's claim for RM29,829,132.40, the learned judge ruled that it is an item of special damages which must be specifically pleaded and strictly proven.

[33] The learned judge considered the authorities on damages, inter alia,

Bonham-Carter v Hyde Park Hotel Ltd [1948] WN 89; *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; *Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2015] 2 MLJ 24) and the objection taken by the defendant that the claim was caught by s 75 of the Contracts Act 1950 ('the Contracts Act'). His Lordship found that the defendant had not challenged the factual and legal basis of the plaintiff's claim. His Lordship held that the plaintiff was however not entitled to claim the specific contract sum in light of s 75 of the Contracts Act but nevertheless made an order, in the exercise of his residual discretion, that the plaintiff was entitled to general damages which was to be assessed.

[34] The learned judge dismissed the plaintiff's claim for indemnity in respect of the so-called liability towards Six Sigma and also dismissed the plaintiff's claim for aggravated damages.

[35] For the standing instruction system where the plaintiff claimed for RM612,000, the learned judge concluded that the letter of appointment covered both the standing instruction system and mobile gadget project and that in all probability, there was an assumption and expectation on the part of the defendant that the standing instruction system would also be covered by the zero investment concept. Based on the events that took place, His Lordship however found that the assumption or expectation had been demolished upon the issuance of the plaintiff's quotation of RM612,000 and the issuance of the invoice after the standing instruction system had been fully commissioned.

[36] His Lordship further found that the plaintiff had fulfilled the obligation as the system went 'live'. Regardless of whether the defendant thought that the standing instruction system was within the scope of the letter of appointment or within the zero investment concept or whether it needed the board of trustees' approval, the learned judge opined that the equation changed once the quotation was given to the defendant, followed by the execution of the standing instruction system by the plaintiff and the subsequent issuance of the invoice.

[37] By reason of all the circumstances and conduct of the parties, the learned judge held that the defendant is estopped form reneging on their obligation to pay under the invoice dated 19 January 2015. Judgment was therefore entered against the defendant for the sum of RM612,000 with interest and costs.

[38] Aggrieved, both the plaintiff and the defendant filed notices of appeal to this court, as stated in para 1 above.

A THE APPEAL

[39] The common issues for these appeals relate to:

(a) illegality;

B (b) liability; and

(c) damages and quantum.

The defendant's submission/appeal

C

[40] On illegality which was raised for the first time before us, learned counsel for the defendant submitted that the agreement was void and unenforceable for being in contravention of the relevant provisions of the Financial Services Act 2013 ('the FSA').

D

[41] Essentially, learned counsel submitted that the nature of the plaintiff's obligations under the agreement was such that the plaintiff has contracted to operate a 'payment system' within Schedule 1, Part 1, Division 1 of the FSA. For the agreement to be legal, the plaintiff ought to have been 'an approved E operator of payment system' within s 2(1) of the FSA. The plaintiff did not have any approval from Bank Negara and this contravenes s 8(1)(b) of the FSA.

[42] Several authorities were cited to support the defendant's argument, F including the Supreme Court decision in *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369.

[43] On liability, the defendant submitted that the evidence of Omar bin Othman, the Timbalan Ketua Pegawai Eksekutif (Kewangan), ('DW1') that G the then MD/CEO had no authority to enter into the agreement for the defendant, stood unchallenged. The burden to prove the MD/CEO's authority to sign the contract on behalf of the defendant now falls on the plaintiff which the plaintiff has failed to discharge. In support of his submission, learned counsel for the defendant cited, inter alia, *Juahir bin Sadikon v Perbadanan* H *Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; *CIMB Bank Bhd v Tan Kim Leong Holdings Sdn Bhd & Ors* [2010] 8 MLJ 607 and *Victory Avenue Mfg (M) Sdn Bhd v Matsushita Electronic Devices (M) Sdn Bhd* [2009] 5 MLJ 243. The plaintiff's failure to do so justifies the invocation of adverse inference under s 114(g) of the Evidence Act 1950. In this regard, the defendant I submitted that the learned judge erred in fact and in law in finding that there was no credible evidence on the issue of authority of the MD/CEO.

[44] It was further submitted for the defendant that the plaintiff had been put on notice of MD/CEO's lack of authority. Any reasonable man in PW1's

position would have made reasonable follow-up enquiries on the status of any decision of the board. PW1 could have asked for a board's resolution with an express approval of the contract. To advance his case, learned counsel cited, inter alia, *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 and *Kang Hai Holdings Sdn Bhd & Anor v Lee Lai Ban (trading as the sole proprietor under the name and style of 'Sang Excavating Services')* [2018] 2 MLJ 574; [2018] 1 AMR 252.

[45] It was also argued for the defendant that the learned judge erred in fact and in law in not holding that as a result of the contract being entered into by the MD/CEO purportedly for the defendant without authority, the end result was that there was no contract in existence between the plaintiff and the defendant and in addition, there was no evidence that the board of trustees had ever ratified the unauthorised contract.

[46] Alternatively, it was argued that there was no breach of contract by the defendant and that the learned judge erred in fact and in law in holding that there was a repudiatory breach of the contract by the defendant.

[47] Learned counsel highlighted that there was no absolute refusal by the defendant to perform the contract. The defendant had asked for the contract to be re-negotiated. All the defendant wanted was to sit and discuss. The defendant contended that it was the plaintiff who was in breach by unlawfully terminating the contract.

[48] As regards quantum, the defendant submitted that the learned judge erred in holding that the legal and factual basis of the plaintiff's claim for RM29,829,132.40 was not challenged. Learned counsel argued that the defendant had always disputed the alleged liability and damages. Indeed, by O 18 r 13(4) of the Rules of Court 2012, any allegation of damages and amount of damages in a party's pleading was deemed to be traversed unless specifically admitted. Therefore, it was incumbent upon the plaintiff to prove each and every material part of its case against the defendant.

[49] The defendant further submitted that the learned judge erred in law in giving the plaintiff a second chance to prove the alleged damages by making an order for damages to be assessed. This was because the trial was on both liability and damages. The plaintiff had every opportunity to prove its case for damages and having failed to do so, it was trite law that at best, the plaintiff could only be awarded nominal damages.

[50] The defendant had also argued that the plaintiff has not proved its alleged losses in accordance with the usual law of remoteness of damages as prescribed under s 74 of the Contracts Act 1950.

[51] On the standing instruction, the defendant submitted that the learned judge seriously misdirected himself in construing the contract based on subsequent events (see *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796; *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 MLJ 456). It was further submitted that the decision of the learned judge was contrary to evidence. Learned counsel for the defendant highlighted the evidence of Roshaimi bin Harun, the Ketua Jabatan Latihan Keusahawan ('DW2') who testified that his signature on the quotation was 'bertujuan sebagai penerimaan sebut harga hanya untuk simpanan dan rujukan saya'.

[52] It was also submitted for the defendant that the learned judge fell into serious error of law in allowing the plaintiff's claim for expenses of RM612,00 when His Lordship had accepted that the standing instruction system was part of the same zero investment.

The plaintiff's submission/appeal

[53] In the course of submission, the plaintiff abandoned its appeal against the dismissal of its claim for indemnity and aggravated damages.

[54] As regards the claim for RM29,829,132.40 it was computed based on cl 11.2 read with cl 11.1 of the agreement which provide:

> 11.1 Upon termination of this Agreement:
>
> (a) The defaulting Party shall within thirty (30) days arrange for the payment for the loss of profit and other cost associated to the termination in accordance with cl 11.2 therein; and
>
> (b) The Parties' obligations under this Agreement shall cease and, where such termination is due to the default, breach, act, omission of or otherwise attributable to either Party, the defaulting Party shall indemnity for all costs and expenses incurred by another Party in connection with the Project.
>
> 11.2 In the event that this Agreement is unilaterally terminated by either Party during the subsistence of this Agreement, the defaulting Party shall pay compensation to the other Party reflecting to that Party's Opportunity loss of income for the unexpired term of this Agreement. A Party's Opportunity loss shall be defined as the Party's Entitlement in accordance with clause 5.1 therein earned in the preceding twelve (12) months prior to the termination, multiplied by the unexpired term, measured in years of this Agreement.

[55] The plaintiff takes the minimum 130,000 transactions per month for 15 years multiplied by RM1.30 plus the unpaid invoices in the sum of RM681,002.40 minus the security deposit of RM50,000 already paid by the

defendant. The learned judge disallowed the plaintiff's claim for RM29,829,132.40 on the ground that the claim computed pursuant to cl 11.2 is prohibited by s 75 of the Contracts Act 1950. In this regard, it was submitted for the plaintiff that the learned judge erred, inter alia, in allowing the defendant to rely on s 75. This defence was never pleaded and was never raised at the trial.

[56] The learned judge also erred in failing to exercise the judicial mind to construe cl 11.2 accordingly before concluding that it is a penalty and prohibited by s 75 of the Contracts Act. *Beihai Zingong Property Development Co & Anor v Ng Choon Meng* [1999] 1 SLR (R) 527; *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501 and *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd* [1914–15] All ER Rep 739 were cited in support of the submission. It was further submitted for the plaintiff that had the learned judge taken into consideration all relevant factors, he ought to have found that by cl 11.2 the intention of the parties was to assess damages and not to secure performance of the agreement. In other words, cl 11.2 is a genuine pre- estimation or assessment of damages and is not applicable.

[57] Alternatively, it was submitted for the plaintiff that based on the totality of the evidence, the plaintiff has proved the amount of its damages. The evidence which was not challenged was that due to the defendant's repudiatory breach, the plaintiff suffered loss of income for the unexpired term of the agreement.

[58] The plaintiff's net income per transaction would be RM1.30 – RM1 (RM1 was to be paid to Six Sigma) = RM0.30 per transaction. The defendant has guaranteed a minimum income to the plaintiff based on at least 130,000 transactions. The plaintiff's minimum net income would have been RM0.30 x 130,000 = RM39,000.

[59] The agreement was for a period of 15 years from 18 September 2014–17 September 2029. When the agreement was terminated on 26 April 2015, the unexpired term of the agreement from 26 April 2015–17 September 2029 would be 172.77 months. Thus the plaintiff's minimum net income for the unexpired term would be RM39,000 x 172.77 months = RM6,738,030.

[60] The amount of RM6,738,030, according to the plaintiff, is the net income which the plaintiff would have earned but for the defendant's breach. This amount represents the plaintiff's loss of income resulting from such breach. In addition to the loss of income above, as at 26 April 2015, there was an outstanding fee of RM681,002.40 invoiced by the plaintiff and not paid by

the defendant. Therefore the total loss suffered by the plaintiff by reason of the defendant's breach is RM6,738,030 + RM681,002.40 = RM7,419,032.40.

OUR FINDINGS

Whether the agreement is void for illegality

[61] It was argued for the defendant that the agreement was not a mere contract of supply but ex facie it was a contract for 'payment system'. Learned counsel cited Part 1 Division 1 of Schedule 1 of the FSA which states:

PART 1

Approved business

Division 1

Businesses which require approval

1. Operation of a payment system which —

(a) enables the transfer of funds from one banking account to another, which includes any debit transfer, credit transfer or standing instructions but does not include the operation of a remittance system approved under section 40 of the Money Services Business Act 2011; or

(b) provides payment instrument network operation which enables payment to be made through the use of a payment instrument.

[62] The defendant submitted that the standing instruction system fell within the terms of para 1(a) and (b) of Division 1 Part 1 whereas mobile gadget was covered by para 1(b). Reference was then made to s 2(1) of the FSA which defines 'payment system' as any system or arrangement for the transfer, clearing or settlement of funds or securities' and to s 8(1)(b) of the FSA which provides: 'No person shall carry on any authorized business unless it is approved by the Bank under section 11 to carry on any of the businesses set out in Division 1 of Part 1 of Schedule 1'. 'Authorized business' as defined in s 2(1) of the FSA means a licensed business or an approved business.

[63] It is not in dispute that the plaintiff had no licence to carry on the authorised business of payment system. However, we do not think that the agreement is ex facie illegal. Under the agreement, the plaintiff has undertaken to build and to develop the mobile gadget and standing instruction system for the defendant for purposes of collection of loan repayment from the defendant's customers. It is the defendant who collects the repayment either through the mobile gadget device used by the defendant's officers or through the standing instruction system operated by Maybank. The plaintiff merely provide the infrastructure. In other words, the plaintiff supplied the system and the defendant used or applied the system for its business of collection repayment of the loan.

[64] Further, the agreement envisages the involvement of Bank Negara as evident from cl 6.1 and envisages the appointment of a third party subcontractor under cll 3.3 and 4.1. On the evidence, there was a subcontract between the plaintiff and Six Sigma. Six Sigma in turn liaised with a company called GHL. GHL had the necessary licence from Bank Negara to operate the payment system.

[65] Be that as it may, on the issue of illegality, we find guidance from the Federal Court decisions in *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 and *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81. In *Lori (M) Bhd*, Edgar Joseph Jr FCJ said at p 104:

> It is well settled that at Common Law, a contract or transaction in breach of a statutory prohibition and an associated contract is, in general, void for illegality even though the statute is silent as to its consequences and merely inflicts a penalty on the wrongdoers (see *Menaka v Lum Kum Chum*, at pg 94, *Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat* but this is subject only to any contrary intention manifested by the statute (see *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*).

[66] In *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* [1978] 139 CLR 410, the respondent granted a loan to the first appellant, repayment of which was secured by mortgage which incorporated a guarantee given by the other appellants. The first appellant defaulted in repayment. The respondent sued the appellants on the personal covenants in the mortgage. The appellants pleaded illegality. Their case was that the mortgage (including the guarantee) was rendered illegal and void by the provisions of s 8 of the Banking Act 1959, as amended or alternatively that by reason of the provisions of a court would not assist the respondent to give effect to the transaction.

[67] In holding that judgment was rightly given to the respondent, Gibbs ACJ said at pp 413–414:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy, it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. ... Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.
>
> The question whether a statute, on its proper construction intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes. ...

> There is no doubt that Pt II of the Banking Act, in which s 8 appears, was enacted partly at least for the protection of depositors, or that one object of s 8 is the protection of the public. Section 8 of course does not expressly prohibit the making or performance of contracts, but the argument advanced on behalf of the appellants was that the prohibition which it imposes on an unauthorized body corporate from carrying on any banking business extends to all activities which go to make up the business of banking.
>
> The language of s 8 indicates that it is directed, not at the making or performance of particular contracts, but at the carrying on of any banking business.
>
> ...
>
> Having regard to the language of s 8 and to the matters to which I have referred, I conclude that s 8, on its proper construction does not vitiate contracts made by a body corporate in the course of carrying on a banking business in breach of the section.

[68] Likewise in the instant case, s 8 of the FSA did not provide that a contract which purports to render services to an approved business without first securing the approval from Bank Negara is void and unenforceable. Further, there is a provision in s 270 of the FSA which 'manifested the contrary intention of the statute' as held in *Lori (M) Bhd*. Section 270 reads:

> 270 Breach or contravention not to affect contract, agreement or arrangement
>
> Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement, or arrangement, entered into in breach or contravention of any provision of this Act shall be void solely by reason of such breach or contravention:
>
> Provided that nothing contained in this section shall affect any liability of any person for any administrative, civil or criminal actions under this Act in respect of such breach or contravention.

[69] Pursuant to s 270 which is a saving provision, the mere fact that the agreement was entered in contravention of the FSA, is not by itself sufficient to render the agreement void. There must be some other provisions in the FSA which has the effect of rendering the agreement void. Except for various provisions on penalty and sanction for breach, we do not find any other invalidating provisions in the FSA which has that effect.

[70] In the instant case, collecting repayment from its customers had been the business of the defendant for a long time albeit done manually without the mobile gadget and standing instruction developed by the plaintiff. The defendant had the requisite approval from Bank Negara to do so. As such it was at all material times carrying on approved or licensed business. Such approval was for the giving out of loans and collection of the same. The present contract merely serves to facilitate the collection of the repayment of loans using information technology to replace manual collection. Surely the business of

collection of the repayment of its loans cannot be an illegal business. If at all there is any element of illegality by the implementation of the new improved system of collecting repayment, the defendant, a government agency cannot rely on its own illegality to defeat the agreement. We are thus unable to sustain the defendant's argument on illegality and we hold that the agreement is valid.

Whether liability has been established against the defendant

[71] It was the plaintiff's case that the following acts of the defendant constituted a breach of the agreement:

(a) the defendant refused to accept delivery of the remaining mobile gadgets or received training for its officers in other states by the plaintiff despite the plaintiff's repeated requests and reminders;

(b) the defendant directed all its officers in the Federal Territory to completely stop using the mobile gadgets for the collection of repayment of loan on 20 March 2015 without giving prior notice to the plaintiff;

(c) the defendant had only paid two monthly installments of RM25,000 each out of the 20 monthly installments for the deposit fee for the mobile gadget as required under cl 3.6(f) of the agreement ie in the months of September and October 2014 and failed to pay the subsequent monthly installments since the month of November 2014. The plaintiff's invoices for the installments of deposit for the months of November 2014–March 2015 respectively, remained unpaid;

(d) the defendant did not make any payment towards the invoices for cash and cheque transactions issued by the plaintiff in accordance with cl 6.2(c) of the agreement for the months of November 2014–February 2015;

(e) the defendant did not make any payment towards the invoices issued by the plaintiff based on the minimum guarantee of monthly transactions in accordance with cl 6.3 of the agreement for the months of January, February and March 2015;

(f) the defendant did not at all inform or discuss with the plaintiff about the defendant's refusal to continue with the project and the reasons behind such refusal;

(g) the defendant took drastic step to block the plaintiff's access to the defendant's database and system; and

(h) the defendant blocked the plaintiff's application abruptly on 23 March 2015 without giving any prior notice to the plaintiff.

[72] The learned judge found that the conduct of the defendant in unilaterally suspending the mobile gadget project allegedly because they

wanted to conduct a review as to its feasibility and/or to obtain the board of trustees approval are nothing but a facade or cloak to re-negotiate the monetary terms of the agreement. His Lordship further found that all of the actions of the defendant as described by the plaintiff cumulatively tantamount to conduct which is repudiatory of the agreement and the conduct of the defendant before the issuance of the plaintiff's notice of termination was akin to an 'absolute refusal by the defendant to perform their part of the agreement.

[73] We find no appealable error of law or fact in the findings of the learned judge which was based on evidence. We agree that the defendant's unilateral act of suspending the mobile gadget project amounts to a breach of the agreement. We would add that whilst the defendant placed much reliance on cl 18.1 of the agreement on mutual trust to contend that it was the plaintiff who had breached the agreement by their alleged refusal to attend the meetings and to re-negotiate, it must be emphasised that the defendant had completely ignored this particular clause before unilaterally acting as they did as stated in para 71 above.

[74] We further agree with the learned judge that cl 18.1 can only be invoked if there was unforeseen occurrence or development and that the defendant's change of mind and the purported non-compliance with the defendant's internal procedure does not entitle the defendant to resort to cl 18.1. The termination by the defendant pursuant to the direction given by the government, in our view, was ineffective as prior thereto, the agreement had already been terminated by the plaintiff.

[75] On the issue of authority or lack thereof of the MD/CEO, we similarly find no appealable error on the part of the learned judge to warrant our appellate intervention. His Lordship considered the law on the authority of an agent; actual, apparent or ostensible as set out in *Hely-Hutchinson.*

[76] On the facts of this case, we find that *Turquand* rule as decided in *Royal British Bank v Turquand* [1843–60] All ER Rep 435, applies:

> Persons dealing with the company were bound to make themselves acquainted with the statute and the deed of settlement of the company, but they were not bound to do more; a person, on reading the deed of settlement, would find, not a prohibition against borrowing, but a permission to borrow on certain conditions, and, learning that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done; and therefore, the company was liable whether or not a resolution had been passed.

[77] The Federal Court in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465, states that the rule in *Turquand*'s case protects

outsiders dealing with the company in good faith who are entitled to assume that acts within its constitution and powers have been properly performed. These outsiders are not bound to inquire whether acts of internal management have been regular. It was also held by the Federal Court that *Turquand*'s case cannot be invoked if the outsider relying on the rule knows or ought to have known that there is an irregularity in the management of the company.

[78] The defendant contended that the plaintiff ought to have asked for the board of trustees' resolution. In this regard, learned counsel for the defendant relied on *Kang Hai Holdings* where Prasad Abraham Sandosham FCJ said at p 258:

> [14] ... With the rapid development of modern technology, and the access to information available in the database of the Companies Commission of Malaysia, the law in our view imposes a minimum duty on the 'outsider' to, at the very least, make this minimum check to afford the outsider the protection of the rule in *Turquand* ...
>
> [15] ... More particularly, outsiders dealing with a company who knows that some relevant procedure internal to the company has not been followed cannot invoke the benefit of the indoor management rule (see *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156). This is an exception to the rule in *Turquand*'s case and the burden of establishing it lies on the party invoking the exception ...

[79] *Kang Hai Holdings* concerns a director of a company who had ceased to be a director. The Federal Court considered the effect of the particulars of Form 49 on an outsider where it was held at p 261:

> ... Form 49 is a public document which contains particulars of directors who are the mind and will of a company, as well as managers and secretaries who are responsible for the day-to-day running of the company. It is a document which affects the powers of the company and its agents. Certainly, its purpose must be more than just to provide information about the company's directors, managers and secretaries. Therefore, persons dealing with the company should check with the Registrar of Companies who its directors, managers and secretaries are at any given time.

[80] To our minds, the latest Federal Court decision in *Kang Hai Holdings* does not change or modify the decision in *Pekan Nenas.* Furthermore, in the instant case, the plaintiff was not dealing with a company but with a government agency. There was no evidence that the plaintiff knew of any irregularity in the internal management of the defendant. On the contrary, there was evidence that the plaintiff had no knowledge of the defendant's purported policy that any transaction above the value of RM500,000 requires the approval of the board of trustees. In fact, during trial, in cross-examining Faiyaz Ali bin Thaiyoobu Thahir ('PW1'), the defendant took the position that whether or not the defendant needed to take the agreement to the board of

trustees was an internal matter or procedure and that the plaintiff had no knowledge of the internal procedure of the defendant. There was also evidence that the plaintiff was informed by the MD/CEO during the meetings that the matter was brought to the defendant's board of trustees for approval.

[81] In addition, we find that by cl 7.1 of the agreement, the defendant had given a clear representation to the plaintiff of the *Turquand* rule. Clause 7.1 reads:

> 7.1 TEKUN hereby represents and warrants to PDSB that TEKUN is entitled to and has the unconditional right to appoint PDSB for the performance of the Project and undertakes to indemnify and keep indemnified PDSB for any loss or damage directly suffered or incurred by PDSB if for any reason PDSB is not permitted to undertake or continue undertaking the Project.

[82] We therefore find no basis to conclude that the judge was plainly wrong on the issue of authority of the MD/CEO and we are in total agreement with the learned judge on his findings below:

> 100. Here, the agreement was executed by the MD/CEO and duly witnessed by DW1, who was the Deputy CEO in charge of Finance. DW1, more than anyone else should have known about the need for board of trustees approval, if indeed there was such a need internally. In this regard, it is significant that DW1, together with senior officials of the defendant *(including the Head of Internal Audit and Head of Legal)* attended the last meeting on 17 September 2014 and nothing was raised about the need for board of trustees approval at that meeting.
>
> 104. ... In the present case, the person who executed the agreement on behalf of the defendant was the then MD/CEO. In law, an MD/CEO, is someone who has either actual or ostensible authority to bind the company.
>
> 105. Also, it is significant that the agreement was not transacted or discussed surreptitiously between the plaintiff's representatives and the then MD/CEO. Rather, it was discussed transparently at various meetings and went through various drafts before it was finalised and executed. At these meetings several high ranking officials from the defendant, including the defendant's legal officer, were present.

[83] We also agree with the learned judge on his findings with regards the standing instruction system. His Lordship had considered the contemporaneous documents and the whole circumstances and probabilities of the case (*Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229). The findings are not perverse. We endorse the findings of the learned judge that the plaintiff had fulfilled their obligation. The development of the standing instruction system was completed. A user acceptance test was held on 3 November 2014 and a series of tests were successfully conducted. The system was accepted by the defendant. It was uploaded onto the defendant's server and the system went 'live' on 24 December 2014.

[84] We therefore affirm the learned judge's finding on liability for both mobile gadget project and the standing instruction system.

Whether the plaintiff is entitled to the sums claimed for mobile gadget project and the standing instruction system

[85] The plaintiff made separate claims for mobile gadget project and the standing instruction system. In this regard we uphold the learned judge's finding that because the mobile gadget project represented 'phase one' of the system, the letter of appointment covered both the standing instruction and the mobile gadget project. However, after the letter of appointment was issued, there were discussions between the parties which culminated in the finalisation of the terms of the agreement. As observed by the learned judge, the agreement significantly made no mention of the standing instruction system. In fact, the agreement deals solely with the mobile gadget project.

[86] We further agree with the learned judge that although the defendant may have initially expected the standing instruction system to be part of the zero investment concept, based on the conduct of the defendant, that expectation had been demolished. It was indeed strange that the defendant did not object to the plaintiff's detailed quotation on the standing instruction system. Not only did the defendant fail to object to the quotation for RM612,000, the invoice that followed was duly acknowledged by the defendant. The conduct of DW2 who testified that the quotation and invoice received and acknowledged was merely to be kept and referred by him was in defiance of logic, common sense and commercial sense.

[87] Indeed, if there was no such understanding that the plaintiff be paid separately for the standing instruction system, one would have expected the defendant to immediately protest and/or raise an enquiry with the plaintiff on the quotation (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155; *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233; *Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd* [2004] 4 CLJ 18 and *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324; [2001] 1 CLJ 779). Moreover, there was evidence led by PW1 that the invoice was acknowledged after several weeks as DW1 wanted to be certain that the standing instruction system had been successfully implemented and gone live. Clearly, the reasonable inference to be drawn from the established facts would be that the defendant had agreed to the quotation of RM612,000.

[88] For the above reasons, we uphold the learned judge's decision on quantum of RM612,000 for the standing instruction system.

[89] In respect of the mobile gadget project, the learned judge ruled that the sum of RM29,829,132.40 claimed by the plaintiff is an item of special damages which must be specifically pleaded and strictly proven.

[90] Although His Lordship decided that the plaintiff was not entitled to the specific amount claimed under cl 11 of the agreement in the light of s 75 of the Contracts Act, he found that the plaintiff was entitled to general damages which was to be assessed.

[91] Notwithstanding that the trial was conducted on the basis of both liability and quantum, the learned judge was of the view that the trial was still afoot and he could exercise his residual discretion to order damages to be assessed, as a matter of procedural fairness and justice, since the defendant had not specifically challenged the specific amount claimed by the plaintiff until the submission stage.

[92] Whilst we find that the learned judge was correct on the law pertaining to damages, we disagree with the learned judge that the claim of RM29,829.132.40 is an item of special damages. In our view, it is general damages quantified as per cl 11.2 upon breach. Clause 11.2 appears to us to be a penalty under s 75 of the Contracts Act because it stipulates and specifies the sum as being payable upon breach. It is settled law that if a sum is named in a contract as the amount to be paid in case of breach, it is to be treated as a penalty and therefore void under s 75 (see *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374; *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569). As cl 11.2 contravenes s 75 of the Contracts Act, we are bound to strike it down under *Selvakumar* and *Johor Coastal.* It follows that the learned judge was correct to disallow the plaintiff's claim for RM29,829,132.40.

[93] That however was not the end of the matter. Breach of contract may give rise to damages for loss of profit pursuant to s 74 of the Contracts Act. In our view, a construction of the contract as a whole discloses that cl 6.3 is part of the clause dealing with consideration or price as agreed between the parties. This is to be differentiated from cl 11.2 which is a provision for compensation on default or breach, which we found to be a penalty. Therefore in assessing damages, cl 6.3 is not caught by s 75 of the Contracts Act.

[94] In *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177, trial was conducted on both liability and quantum. The claim for lost profit was dismissed by the High Court which was upheld by this court. In the Federal Court however, it was recognised, as we have done here, that the aggrieved party was entitled to damages for loss of

profit on principle pursuant to s 74 of the Contracts Act which provides: A

74 Compensation for loss or damage caused by breach of contract

(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract to be likely to result from the breach of it. B

(2) Such compensation is not to be given for any remote and indirect loss for damage sustained by reason of the breach. C

[95] The Federal Court went on to hold that it did not approve the mode of calculation for the loss of profit. The matter was then remitted to the High Court for assessment of damages notwithstanding that the trial was not bifurcated. At p 216, Zainun Ali FCJ said: D

[118] However, we do not approve of the appellant's method of calculation for the loss of profit. In its pleadings the appellant claimed for over RM19m whilst in its written submissions the appellant claimed RM10,415,421.43 (and, incidentally, incorrectly added the word million behind the figure). Let it be said that such careless disregard for precision is less than satisfactory. Counsel for the appellant stated that 'this sum (and the formula used in arriving at that figure) was explained and had been proven at trial. Essentially it is based on the average of the commissions due to the appellant for the preceding 40 months which is then multiplied with the balance [of] 20 months. The accuracy of these figures were not challenged during trial. ... E F

[119] This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on 'commissions', that is to say receipts, is very different from a calculation based on 'profits'. To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonably incurred in the remaining 20 month period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved. However, contrary to the respondent's submission and the judgment of the trial judge, the mere fact that the formula was the appellant's own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula. The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court. G H I

[120] Therefore, contrary to the respondent's submission, we do not think that proper consideration on quantum was allowed for at trial. There were no clear submissions made as to the expenses incurred and a very loose use of the words

> pendapatan and kutipan, which shed no light on the actual loss of profits. The respondent should also take the opportunity to submit on whether the formula is a proper representation of the loss of profits, that is to say whether or not there are any other factors that could reasonably have been expected to increase or reduce collections, and corresponding commissions, be it a significant reduction in remaining arrears or for any other reason. The challenge by the respondent exclusively on the basis that loss of profits was not expressly stated in cl. 8.5 was wholly inadequate.
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> ...
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> [122] ... We order that this clam be remitted to the High Court for assessment of damages, by a High Court judge on the issue of quantum occasioned by a wrongful termination of the contract.

[96] In like manner in the instant case, the plaintiff is clearly entitled to be compensated for any loss or damage including its loss of earnings and profits, if any, although it cannot rely solely on cl 11.2 to do so.

CONCLUSION

[97] In light of all the above, we unanimously dismiss both the defendant's appeal and the plaintiff's appeal. Guided by the decision of the Federal Court in *SPM Membrane,* we therefore conclude that the matter be remitted to the High Court judge for assessment of damages in order to ensure that the plaintiff is fairly and reasonably compensated for the defendant's conduct and breach.

Appeals dismissed.

Reported by Afiq Mohamad Noor